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ABSTRACT

High school students and administrators continue to meet in courtrooms to dispute the extent to which freedom of expression is granted to writers and editors of student publications. A review of more than a dozen such cases decided by state and lower federal courts in the last two years shows that judges have given increasingly greater freedom to students while insisting that school officials may do no more than establish narrow, carefully drawn regulations to prevent printed material from causing substantial interference with school operations. Court decisions against regulations that allow high school administrators to impose prior restraint on printed material make it increasingly difficult to impose such censorship. Other court decisions on libel and obscenity in school publications indicate that standards set by the courts for the general community do not change in the high school setting. (Three appendixes contain samples of regulations, legal definitions, and excerpts from student codes that are pertinent to student press rights.) (Author/RL)

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RECENT DEVELOPMENTS IN SECONDARY STUDENTS' PRESS RIGHTS

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RECENT DEVELOPMENTS IN
SECONDARY STUDENTS' PRESS RIGHTS

The extent of freedom of expression to be granted to public high school students, a gray area since courts began ruling in such cases less than a decade ago,[1] remains a point of contention between administrators and students. More than a dozen cases have been decided by state and federal courts in the last two years, the rate of resorting to litigation as a means of resolution continuing unabated. Of significance is that judges generally have been giving increasingly greater freedom to students while insisting that school officials may do no more than establish narrow, carefully drawn regulations to prevent printed material from causing substantial interference with school operations.

The most incendiary regulations are those allowing prior restraint of printed material, permitting administrators to review and approve publications before they may be distributed on campus. Some courts have read the landmark Supreme Court case, Tinker v. Des Moines Independent Community School District,[2] as allowing prior restraint if required to prevent material and substantial interference with school operations. By 1973 four Courts of Appeals--those for the First,[3] Second,[4] Fourth,[5] and Fifth[6] Circuits--had held that prior restraint was constitutionally permissible to maintain school decorum and prevent disruption of school activities if certain procedural safeguards were available.[7] Only the Seventh Circuit had held the prior restraint was no more acceptable in public high schools than for citizens generally.[8] Since then, one other Circuit and several lower federal and state courts have ruled on prior restraint, generally holding it permissible, but indicating that acceptable regulations may be exceedingly difficult to write.

Perhaps the best example of this contradictory approach is Nitzberg v. Parks,[9] in which a school district rewrote prior restraint regulations five times, four versions being found unacceptable by a federal district court, the

final draft ultimately being rejected by the Fourth Circuit. The case was initiated after school officials of the Woodlawn Senior High School in Baltimore County, Md., ordered students to stop publishing two "underground" newspapers or face suspension. One paper was banned because of an article describing cheerleaders as "sex objects"; administrators thought this to be "obscene" and "demeaning." Suit was filed to prevent alleged violations of the students' First and Fourteenth Amendment rights.

The significance of Nitzberg is that the school board's final draft of regulations (see Appendix A) would seem to comport with the Fourth Circuit's requirements as previously stated in Baughman v. Freienmuth[10] (see Appendix B), i.e., that criteria for what is forbidden must be specific, that a definition of "distribution" must be supplied, that administrators must take action quickly, and that an appeals procedure must be specified. However, the Fourth Circuit emphasized that regulations must be "narrow, objective, and reasonable," and found the board's rules wanting. For instance, the court said the rules gave "no guidance as to what amounts to a 'substantial disruption of or material interference with' school activities," the Tinker guideline for allowing restrictions on students' freedom of expression. Similarly, the regulations did not specify the criteria to be used by an administrator in predicting whether disruption would occur as a result of the distribution of student-produced material. While noting that the board's rule was obviously intended to comport with the Tinker guideline, the Fourth Circuit said that "the phrasing of a constitutional standard . . . is (not) sufficiently specific in a regulation to convey notice to students . . . of what is prohibited."[11]

Additionally, the court held that a regulation under which a principal must within three "pupil days" make his decision about allowing material to be distributed was infirm because "pupil days" was not defined. Also, no time limit was specified for appeal from the assistant superintendent's decision to the

superintendent, and final review by the school board was to be at its next regularly scheduled meeting. Such "protracted steps in the appeals procedure" do not allow the prompt action required in freedom of expression cases, said the court.

Importantly, the Fourth Circuit said that due process considerations were necessary in such determinations, particularly since a student violating an order not to distribute material would be subject to suspension. Thus, the court saw the need for a student to be able to appear before the principal to present persuasive arguments for allowing distribution.

Finally, the court said it "deplore(d)" having to continually decide issues of students' freedom of expression. It strongly suggested that students and school officials explore ways to solve such problems without resorting to litigation (though stressing that the court could not permit suppression of "the First Amendment rights of individual students" simply to ameliorate problems facing administrators in operating schools).[12] The court suggested as one alternative formation of a Student-Faculty Relations Committee, perhaps similar to the Board of Publications used by some high schools.[13]

While in Nitzberg the Fourth Circuit reinforced its earlier prior restraint rulings, the Sixth Circuit spoke on prior restraint for the first time recently, albeit only inferrentially, in a curt reversal of an anomolous district court decision. In Hannahs v. Endry,[14] distribution of an edition of a high school newspaper was stopped by the school principal, who objected to seven articles and editorials. By stipulation, only one editorial, "Where Are You Mr. H.S. Athlete?", was presented to the district court for consideration in a suit brought by several staff members of the paper who objected to the principal's actions.

The district court viewed the situation as a "confrontation between an asserted First Amendment freedom and the very real obligation on the (administrator's part) to maintain order and decorum in a public high school."[15] This

implication that school officials' concerns about discipline are more important than students' freedom of expression is pervasive in the court's opinion. In fact, while admitting that the Supreme Court has forbidden the in loco parentis concept from being used to deprive students of constitutional rights, the court said the doctrine may be "used as a shield to protect minors from harm." On that basis, the court equated protecting a child from obscene material[16] with an administrator's "interest in protecting him from disruption of an orderly educational process." Combined with holdings that students cannot openly disrupt the educational process and that prior restraint is not "unreasonable in all circumstances," the court upheld the principal's actions in not allowing distribution of the paper. The court cited the Tinker "material and substantial interference" test and noted that administrators need not wait until disruption has occurred before taking action. In this regard, the court said:

> (The principal) assumed he could reasonably forecast disruption if plaintiffs' publication went forward as scheduled. If he was wrong, he was, at least, wrong for the right reason, i.e., an effort to avoid disruption or violence. There is no evidence that he acted maliciously or with evil intent. We are unwilling to permit students to substitute their judgment on the threat of disorder in the school for that of the principal. . . . Is it not yet time to return education to the educators? Must a degree of Juris Doctor together with training in riot control be a necessary prerequisite for a successful principal?[17]

This decision must be compared with Nitzberg in which the Fourth Circuit so adamantly insisted on precise wording of narrowly drawn regulations and on due process considerations before prior restraint could be imposed.

Seemingly, the Sixth Circuit thought the district court's opinion out of step with judicial attitudes toward students' freedom of expression. The Court of Appeals tersely reversed the lower court, holding that its judgment that distribution of the paper "would be 'disruptive of an orderly and peaceful atmosphere in which children . . . may receive an adequate education' is on the basis of the entire record clearly erroneous."[18] This does not indicate that the Sixth Circuit agrees with the Seventh Circuit that prior restraint is not

constitutionally permissible. Rather, the court seems to imply that if disruption or potential disruption could have been proved[19] the principal's decision might have been upheld.

Two other federal district courts have also ruled in prior restraint cases, both in circuits in which the Courts of Appeals had not given previous guidance. In Peterson v. Board of Education,[20] Lincoln, Neb., high school principals and the Superintendent of Schools forbade distribution on school grounds of an underground newspaper. Several editions of the paper had been given to students, some of whom voluntarily paid for copies, at the outer entrances of Lincoln public high schools prior to the administrators' decision. School officials claimed that distribution violated district rules against commercialism in the schools, soliciting funds from students, visitors in the schools, and selection of instructional materials. The newspaper editors asked the court for permission to distribute near the outside of building entrances in a nondisruptive manner.

Viewing the situation as a case of prior restraint, the district court refused to accept any of the administrators' rationales for forbidding distribution. First, the court said that the newspaper was primarily a vehicle for dissemination of news and opinion, that the advertisements were a minor part of the publication, and therefore that the anti-commercialism rule did not apply. Newspaper distributors were not soliciting money, though contributions were accepted, said the court. In answer to administrators' fears that such a ruling might open the flood gates to numerous individuals and organizations being allowed on school grounds to solicit funds or engage in profit-making activities, the court distinguished publications devoted "largely to expression of opinion and factual matter" from purely commercial activities, the former being protected forms of expression. The court also noted that officials had not been "ever-handed" in enforcing the anti-commercialism rule, allowing ads in the school papers and permitting some charitable organizations to solicit funds, while forbidding distribution of the underground newspaper.

Second, the court said that there was no indication that the paper would become an instructional tool in the schools, which administrators had claimed would undermine their prerogative in the selection of such material. Third, the court said it was acceptable to have all school visitors first report to the principal's office, but banning newspaper distribution on the assumption that such visitors might disrupt school activities was not permissible. Finally, the court said that as long as the paper contained only otherwise protected material, school officials could not prohibit its distribution without showing that it would cause material and substantial interference with school work or discipline.

Peterson is the only case in the Eighth Circuit to present the prior restraint question. To date, the Circuit Court of Appeals has not issued a ruling on the subject.

Similarly, the Court of Appeals for the Ninth Circuit has not discussed prior restraint in public high schools, thus the ruling of a federal district court in California (part of the Ninth Circuit) in Pliscou v. Holtville Unified School District[21] is of interest. This case presents a unique factual situation. A new faculty advisor was selected by the Holtville High School principal for The Saga, the official student newspaper. The student who expected to be editor appointed Lisa Pliscou, plaintiff in the case, as assistant editor. However, the new advisor eliminated those two positions, deciding to appoint only page editors. Pliscou refused an offered appointment as a page editor. Additionally, Pliscou was elected president of the Quill and Scroll Society, an organization for student journalists and an officially recognized student group at Holtville High School. Quill and Scroll members decided to publish a newspaper of their own. The club's sponsor, who was also the former Saga advisor, reported that the principal would not allow a second paper and she resigned as Quill and Scroll sponsor. Appointed in her stead was O. Ray Warren, a faculty member who was also the freshman football coach. At this point, the school district adopted a set of regulations regarding student distribution of printed material.

During the fall term, Pliscou held a Quill and Scroll meeting at her home to work on the club's newspaper, entitled The First Amendment. Warren did not attend the meeting. In order to finance the paper, the group attempted to ask permission to solicit advertising. Permission had to be granted by the principal and the student council. However, Warren would not authorize the request and the student council decided it could not act without signatures from Warren and the principal. A subsequent Quill and Scroll meeting was attended by a large number of football players the court described as "expressing a sudden interest in journalism." Warren characterized the meeting as a "general disturbance." Pliscou then asked the court for an injunction enjoining school officials from interfering with her First Amendment rights.

While noting that a student's rights may be circumscribed by the special characteristics of the school environment, the court said this was true only within narrowly defined boundaries. Specifically, reasonable rules and regulations may be generated to prevent material and substantial interference with school activities. However, arbitrary, discriminatory decisions are not permissible. For instance, said the court, while a school is not required to establish a student paper,[22] once one is formed it "cannot be suppressed because of its editorial content." However, the court saw this case as not involving direct regulation of expression, but "regulation of conduct which incidentally limits (expression)." That is, as a practical matter The First Amendment could not be published without advertising to finance its printing, and advertising could not be solicited without school officials' permission. Moreover, said the court, publishing a paper is a logical and proper activity of a group such as Quill and Scroll. Thus, administrators were singling out that organization in denying its request, while allowing fund raising activities by other school groups. Said the court, "Viewed in its entirety, the denial of the proferred activity request stands suspect and will not be condoned, especially where First Amendment con-

siderations loom in the background."[23] In the absence of specific criteria for denying activity requests, the court would not allow Quill and Scroll's request to be singled out for refusal. This "constitutes a denial of equal protection," said the court.

The district court decision in Pliscou goes further. It also carefully reviewed the district's regulations concerning student-distributed printed material. One rule stated that material "shall be presented to the Principal prior to distribution." When considered with other rules limiting the types of material which could be distributed, said the court, the regulation seemed to be the means by which officials could impose prior restraint. However, without evaluative criteria and procedural safeguards, such a regulation could not stand. Additionally, the court would not permit a rule forbidding collection of "funds or donations . . . for newspapers and other printed matter." The court said such a ban on the sale of newspapers involves restricting conduct which includes both speech and nonspeech elements, and thus is too sweeping a use of a school board's powers. Finally, a rule forbidding distribution of material "that incites students toward the disruption of the orderly operation of the school" was found to be unconstitutionally vague, not providing "explicit standards" nor specifying consequences which would follow violation of the rule. Also, the rule did not specify who would interpret and apply it. In sum, the court called the regulations "a ruse to stifle First Amendment rights."

In another California case, the state Court of Appeals focused on due process questions in dealing with a prior restraint situation. In Bright v. Los Angeles Unified School District,[24] students at University High School asked their vice-principal for permission to distribute an underground newspaper, pursuant to a school rule requiring such authorization. Previous editions of the paper had been distributed with permission, but this issue contained an article headlined "Principal Lies," stating that the principal of another high school had

uttered four falsehoods in a meeting with students. The vice-principal took the newspaper to the principal, who asked the county counsel for advice. He also contacted the principal mentioned in the article, who said he may have made the quoted statements, but that in any case the statements were true, not lies. The principal told the students they could not distribute the paper because the story in question was libelous.

Partly at issue in this case are regulations of the California Education Code. Earlier sections of the Code referring to student publications were ruled unconstitutional by a three-judge federal court.[25] Revised regulations stated that certain material, including that which is libelous or would incite students to unlawful acts, "shall be prohibited" (see Appendix C). Students bringing this suit claimed that the word "prohibited" did not authorize a system of prior restraints. The California Court of Appeals agreed, holding that the state legislature intended "prohibited" to mean "forbid," rather than "prevent." In part, this ruling is based on a guideline adopted by the California State Board of Education containing the following language: "There should be no prior restraint or requirement of approval of the contents or wording of the printed materials related to student expression on campus."[26]

Of more general interest is the court's discussion of the circumstances under which prior restraint may be permitted. The Court of Appeals states that Tinker allows prior restraint when necessary to prevent "conduct potentially or actually disruptive of the educational process." The court also cites cases in other jurisdictions allowing administrative review of material before distribution on public high school campuses. However, the decision says that prior restraint is not permitted for material that is "libelous or slanderous according to current legal standards." First, the court says, other prior restraint cases, including the Supreme Court's landmark decision in Near v. Minnesota,[27] have not included libelous material among the exceptional circumstances per-

mitting prior review. Second, libelous material would ordinarily not pose a threat to orderly functioning of the school in the terms meant by Tinker. Third, because determining what is legally libelous is such a difficult task today, a regulation allowing prior restraint for "material which is . . . libelous according to current legal standards" might well be unconstitutionally vague. The court did not prohibit punishment after publication if indeed the material was found in court to be libelous.

Additionally, the court found the principal's procedures denied due process to the students, since he banned distribution "without a reasonably complete and fair investigation." Inquiring into the truth of the statements by asking only two other school administrators was not sufficient. The school district has appealed the Bright decision to the Supreme Court of California.

In Eisner v. Stamford Board of Education,[28] one of the first high school prior restraint cases, the Second Circuit decided that administrators could ask for approval of material before distribution if procedural safeguards were present. A federal district court in New York, part of the Second Circuit, also upheld prior restraint, but within more restrictive parameters than earlier indicated by the Court of Appeals. In Bayer v. Kinzler,[29] the Farmingdale High School student newspaper attempted to distribute an issue containing a sex information supplement. Students had written on such subjects as contraception and abortion; the court described the articles as "serious in tone and obviously intended to convey information rather than appeal to prurient interests." The school principal seized copies of the newspaper and supplement, refusing to allow distribution.

Such prior restraint was not allowed in this instance because the court did not believe distribution of the supplement would (1) cause material and substantial disruption in the school, (2) present a "clear and present danger" of causing substantial evils the state had a right to prevent, (3) abridge parents' rights

to freedom of religion, since "no student is compelled to read the school newspaper," and, thus, no one need be exposed to information in the supplement against his will, and (4) intrude into the school curriculum, since the newspaper was an extracurricular activity with no academic credit given for serving on the staff. However, said the court, even giving credence to the "intrusion" theory would not justify interfering with students' freedom of expression. For instance, since social studies is part of the curriculum, it might be held that wearing black arm bands to protest a government action (as in the Tinker case) would be such an intrusion. The Supreme Court has held otherwise.

Reviewing these cases, particularly Nitzberg, shows that courts are able to theoretically explain their stands on prior restraint in high school and can enumerate the types of regulations they would require, but that in practice it is nearly impossible for school administrators to write rules courts will accept. In Bright, the California Court of Appeals suggested that one compromise might be to require submission of materials to school officials "for informational purposes only." If questions then arose about the publication, "the matter could be handled by appropriate disciplinary proceedings embodying the rudiments of due process."[30]

Another form of administrative control over students' freedom of expression is post-distribution punishment. Fewer examples of this type of case go to court now than earlier in the controversy over students' rights, but such litigation recently arose in Puerto Rico when a junior high school student was suspended for distributing political handbills.[31] Handbills asking students to participate in activities of a political party which advocated Puerto Rican independence were distributed during school hours and on school grounds.

The student was suspended for five days for violating a regulation prohibiting "circulating propaganda in the school which is alien to school purposes." A federal district court called this "about as broad a ban upon free expression

in school as can be imagined." Noting that the regulation was not limited to prohibiting material which would cause material and substantial interference with school operations, the court would not accept administrators' contentions that the rules were necessary to prevent political agitation on the school campus. The court said such "undifferentiated fear" was an impermissible reason for restricting students' rights.[32]

Interestingly, the court took note of cases in which the First Amendment question had not been reached because the student's conduct was a "flagrant" violation of school rules[33] or because the student showed "gross disobedience" of rules or "gross disrespect" toward school officials.[34] But the court said that in this case "school rules were peacefully tested by means of one time violations."

In addition to being concerned about disruption of school activities, administrators have used fear of libel actions as a reason for imposing prior restraint or insisting that a newspaper's coverage be noncontroversial. Several cases have recently touched on the subject of libel in student publications.

In considering these cases, it is necessary to briefly review significant Supreme Court libel decisions. Prior to the 1964 New York Times v. Sullivan case,[35] the media relied on common law defenses against libel actions: qualified or conditional privilege, fair comment, and truth. In New York Times, however, the Court said that public officials must prove actual malice to recover for defamation, that is, "with knowledge that (the report) was false or (published) with reckless disregard of whether it was false or not."[36] Later the Court extended this rule to public figures[37] and finally to individuals involved in matters of general public concern.[38] However, in Gertz v. Robert Welch, Inc.,[39] the Court retreated from this concept and said that private individuals had more protection from defamatory statements in the media than did public figures or public officials. A problem arises in differentiating private individuals from

public figures. For instance, Elmer Gertz, plaintiff in the landmark case, is a prominent Chicago lawyer involved in civic and professional activities. However, the Supreme Court said that he had not voluntarily thrust himself into the controversy from which the defamatory publication arose, therefore he was a private individual as far as the libel action was concerned. Similarly in Time, Inc. v. Firestone,[40] a socially prominent woman who was involved in a highly publicized divorce trial, gave press conferences, and subscribed to a press clipping service was categorized as a private individual by the Court. Such categorization allows a plaintiff to collect damages from a publisher or broadcaster without facing the almost impossible burden of proving actual malice. With the New York Times rule no longer applicable to private individuals suing for actual damages, the common law defenses once relied on are again assuming an importance in libel law.

In light of Supreme Court rulings, it is more true than ever, as the California Court of Appeals said in Bright, that "the current difficulty of defining what is legally libelous today" may make it constitutionally impermissible to impose prior restraint on material thought to be defamatory, since establishing evaluative criteria would be extremely difficult.

It is also true that difficulty in determining what is and is not libelous may mean a greater danger of defamation suits against schools.[41] The Bright case is an example. The court said that a "newspaper serving a particular community (here the high school community) is conditionally privileged to comment on one in a position of prominence therein . . . even though the article may adversely affect that person's reputation."[42] The court stressed that the article dealt with an issue of public concern and with a "public figure in that community as the chief administrator" of a high school. However, the court failed to mention the Gertz decision, although it had been handed down prior to Bright. Whether the principal would now be considered a public figure or a public official is

not entirely clear. It is probable that being a principal would qualify one as a public official or figure, as exemplified by an Illinois appellate court decision holding that certain public school teachers and athletic coaches were public figures for the purposes of a defamation suit since "they maintain highly responsible positions in the community."[43] However, another Illinois appellate court refused to specify that teachers were public officials or public figures for all purposes at all times.[44]

In addition to concern over defamation suits, some school administrators are particularly conscious of what they consider obscene material, usually because of expected adverse community reaction. Much material thought to be obscene by school officials does not in fact fit the legal definition of obscenity.[45] No new secondary cases have dealt with this area, but the Supreme Court recently reaffirmed its position regarding minors and obscene material. In a case involving a municipal ordinance banning certain types of films from being shown at drive-in theaters, the Court said that cities have "undoubted police powers to protect children" and that cities or states can "adopt more stringent controls on communicative materials available to youths than on those available to adults." Nevertheless, said the Court,

> minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.[40]

While students' rights may be increasingly strengthened by court decisions, the position of publications advisors is still amorphous. A case that might have resolved some questions about an advisor's ability to support students whom he or she believes are properly exercising their freedom of expression was recently settled out of court, thus precluding an addition to the limited case

law involving advisors. Joan T. Lentczner, then advisor to the student newspaper at Yorktown (Ind.) High School, permitted students to print a series of articles about premaritial sex, planned parenthood, sex-related problems of high school students, and abortion. Her contract was not renewed for the following year. She sued for reinstatement and monetary damages, but settled the case before a decision was given. She has since taken a public relations position with a Virginia college.[47]

A second case, however, was decided in court--by the Tenth Circuit. In Bertot v. School District,[48] the contract of an English and mathematics teacher in an Albany, Wyo., high school was not renewed. In large part, this action was taken because of her involvement with a student underground publication. Donna Bertot's honors English class suggested publishing a newspaper. She said they could not use class time for the project, but that she would help after school if they wished. Shortly thereafter, she asked another teacher if the principal would object. The second teacher discussed the idea with the administration and reported to Bertot that the principal was quite opposed and that any student participating "would jeopardize his career." Bertot relayed this to the students and said she could no longer be involved in the paper. The students decided to continue on their own. Meanwhile, Bertot had discussed the project with a University of Wyoming journalism student to whom she introduced several students. After that point, however, neither Bertot nor the journalism student was involved in the project. One issue of the paper was published; the court indicates it was not distributed on school grounds.

The Tenth Circuit said that although there was no district policy against a newspaper such as the one the students produced, Bertot's connection with it was the key factor in the decision not to renew her contract. Since discharge for an an exercise of First Amendment rights is not constitutionally permissible, the court attempted to determine of Bertot's actions were within the protection

of the First Amendment. The court answered affirmatively. The court said her actions were protected so long as they did not materially and substantially disrupt school activities, and did not impair her classroom duties. Additionally, the court said her assistance and association with the publication were protected even though no writing of her own was involved. The court would not accept a claim of insubordination on Bertot's part, since the school could not properly have banned the publication. Administrators' basis of not wanting the newspaper seemed to be that it would tend to "degenerate." Such an "undifferentiated fear" was not considered sufficient.

Several courts have indicated a displeasure with having to deal with administrative restrictions on students' freedom of expression and have urged the two sides to resolve controversies before resorting to litigation.[49] Seemingly this will be possible only when both students and administrators understand the rights given to public high school students by courts in a long series of cases involving secondary student publications. Students have freedom of expression, though narrowly mitigated by the circumstances of a high school setting, and administrators have the responsibility of maintaining order on campus. Compromise must be reached between these two positions, but as the Nitzberg court emphasized, administrative concerns cannot be permitted "to suppress the First Amendment rights of individual students."

NOTES

[1]Trager, "Freedom of the Press in College and High School," 35 Alb. L. Rev. 161 (1971).

[2]393 U.S. 503 (1969).

[3]Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971).

[4]Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).

[5]Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

[6]Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972).

[7]See Trager, supra note 1, at 44-50.

[8]Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972).

[9]525 F.2d 378 (4th Cir. 1975).

[10]478 F.2d 1345.

[11]Nitzberg v. Parks, 525 F.2d at 383, quoting Jacobs v. Board of School Commissioners, 490 F.2d 601, 605 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975).

[12]See Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973), aff'g en banc with modification, 476 F.2d 570 (5th Cir.), cert. denied, 416 U.S. 995 (1974).

[13]See Trager and Ostman, "Slaying the Censorship Dragon (Board of Publications: Alternative to Censorship)," 50 Scholastic Editor 8 (Dec.-Jan. 1970-71).

[14]No. 72-306 (S.D. Ohio, Dec. 13, 1973), rev'd, 497 F.2d 923 (6th Cir. 1974).

[15]No. 72-306 at 2-3.

[16]See Ginsberg v. New York, 390 U.S. 629 (1968).

[17]Hannahs v. Endry, No. 72-306 at 5-6.

[18]Hannahs v. Endry, 497 F.2d 923.

[19]See Scoville v. Joliet Township High School District 204, 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970).

[20]370 F. Supp. 1208 (D. Neb. 1973).

[21]No. 75-0926-GT (S.D. Calif., Jan. 9, 1976).

[22]See Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); The Luparar v. Stoneman, 382 F. Supp. 495 (D. Vt. 1974).

[23]Pliscou v. Holtville, No. 75-0926-GT at 9.

[24]124 Ca. Rptr. 598 (App. 1975).

[25]Rowe and Zeltzer v. Campbell Union High School District, Nos. 51060, 51501 (N.D. Calif., Sept. 4, 1970).

[26]Quoted in Bright v. Los Angeles Unified School District, 124 Ca. Rptr. at 601.

[27]283 U.S. 697 (1931).

[28]440 F.2d 803 (2d Cir. 1971).

[29]383 F. Supp. 1164 (E.D.N.Y. 1974).

[30]124 Cal. Rptr. at 605, n. 10.

[31]Cintron v. State Board of Education, 384 F. Supp. 674 (D. P.R. 1974).

[32]See Tinker v. Des Moines, 393 U.S. 503.

[33]E.g., Sullivan v. Houston Independent School District, 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032 (1973).

[34]E.g., Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969).

[35]376 U.S. 254 (1964).

[36]Id. at 279-80.

[37]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[38]Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

[39]418 U.S. 323 (1974).

[40]44 U.S.L.W. 4262 (March 2, 1976).

[41]Contra, see Comment, "Tort Liability of a University for Libelous Material in Student Publications," 71 Mich. L. Rev. 1060 (1973).

[42]124 Cal. Rptr. at 604.

[43]Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. 1974).

[44]Johnson v. Board of Junior College District #508, 334 N.E.2d 442 (Ill. App. 1975).

[45]See Trager, supra note 1, at 33-36.

[46]Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-213 (1975).

[47]Lentczner, "Publications Adviser Fired," 61 Matrix 8 (Winter 1975-76).

[48]522 F.2d 1171 (10th Cir. 1975).

[49]E.g., Bazaar v. Fortune, 489 F.2d 225; Nitzberg v. Parks, 525 F.2d 378.

APPENDIX A: BALTIMORE COUNTY SCHOOL BOARD REGULATIONS*

Rule 5130.1(b): Literature may be distributed and posted by the student of the subject school in designated areas on school property as long as it is not obscene or libelous (as defined below) and as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities.

If a student desires to post or make a distribution of free literature which is not officially recognized as a school publication, the student shall submit such non-school material to the principal for review and prior approval. In exercising this right of prior restraint, principals shall follow the procedures specified in this policy. The principal shall render a decision and notify the student within two (2) pupil days of such submission. If the decision is negative, the principal shall state his reasons to the student in writing. During this period of review, any supply of the material may be retained by the student or may be left with the principal for safekeeping. Distribution of such material during the review and appeal period, or following a negative decision, shall be sufficient grounds for confiscation of such material and suspension of the student by the principal. If the student is dissatisifed with the decision of the principal with respect to the distribution of a non-school publication, the student may appeal this decision to the appropriate area assistant superintendent who shall render a decision, stating his reasons in writing, within three (3) pupil days of such appeal. If an administrator fails to act within the time periods specified in this paragraph, the student(s) who submitted the literature for review may distribute the same. (Appeal from a decision of an assistant superintendent is to the superintendent of schools and thence to the Board of Education at the time of its next regularly scheduled meeting.)

Definitions

1. Libel or libelous material--

The First Amendment of the Constitution of the United States protects the right of free expression by an individual, either in writing or in speech, on all matters of public or general concern about a person, without regard to whether such person is famous or anonymous, in whom the community and press have a legitimate and substantial interest because of who he is or what he has done.** However, a written or oral statement about such a person which is made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it was false or which was made with a high degree

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*Pertinent excerpts.

**This definition was adopted before the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

of awareness of its probable falsity, is subject to sanction and is not protected by the First Amendment of the Constitution.

A statement is libelous and not protected by the First Amendment if it is made with "actual malice" and if it tends to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or if it induces an evil opinion of one in the minds of right-thinking persons, or if it causes one to be shunned and avoided by society.

2. Obscene or obscenity--

The average person, applying contemporary community standards would find that it, taken as a whole, appeals to prurient interest; It depicts or describes, in a patently offensive way, sexual conduct currently defined by Maryland law (27 Anno. Code of Md. § §416, 417);
Taken as a whole, it lacks serious literary, artistic, political or scientific value. The Supreme Court has set forth the following examples of what types of materials can be prohibited as obscene:

"(a) Patently offensive representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (Miller v. California [413 U.S. 15 at 25], 93 S.Ct. (2607] at 2615, [37 L.Ed. 2d 419]) (sic). These examples are adopted herewith as part of this policy.

3. Distribution--

A substantial dissemination of literature in any form which is thus made generally available to students. This includes the posting of literature in areas of a school which are generally frequented by students. The principal will require submission of literature for prior review when there is to be such a substantial distribution of literature, so that it can be reasonably anticipated that in a significant number of instances there would be a likelihood that the distribution would disrupt school operations, or in order to determine whether such material is libelous or obscene as defined in this policy.

APPENDIX B: REQUIREMENTS FOR PRIOR RESTRAINT REGULATIONS IN BAUGHMAN v. FREIENMUTH

(a) Secondary school children are within the protection of the first amendment, although their rights are not coextensive with those of adults.

(b) Secondary school authorities may exercise reasonable prior restraint upon the exercise of students' first amendment rights.

(c) Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.

(d) A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:

(1) A definition of "Distribution" and its application to different kinds of material;

(2) Prompt approval or disapproval of what is submitted;

(3) Specification of the effect of failure to act promptly; and,

(4) An adequate and prompt appeals procedure.

[478 F.2d at 1351.] Accord Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971) (Kaufman, J.).

APPENDIX C: EXCERPTS FROM CALIFORNIA EDUCATION CODE

[S]tudents of the public schools have the right to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia, except that expression which is obscene, libelous, or slanderous according to current legal standards, or which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school, shall be prohibited.

Each governing board of a school district and each county superintendent of schools shall adopt rules and regulations relating to the exercise of free expression by students upon the premises of each school within their respective jurisdictions, which shall include reasonable provisions for the time, place, and manner of conducting such activities.

--from Education Code, section 10611, Stats. 1971, chapter 947, page 1854, section 3.